INDEX

	Page
Motions of appellee to dismiss or affirm	1
Statement	2
Discussion	4
Conclusion	11

CITATIONS

Cases:

American Insurance Co. v. *Lucas*, 314 U. S. 575	10
American Power Co. v. *S.E.C.*, 329 U. S. 90	9
Bass, Ex parte, 177 U. S. 378	4, 5
Bransford, Ex parte, 310 U. S. 354	10, 11
Brownlow v. *Schwartz*, 261 U. S. 216	4, 5
Buder, Ex parte, 271 U. S. 461	10
Chandler v. *Wise*, 307 U. S. 474	5
Cheong Ah Moy v. *United States*, 113 U. S. 216	5
Collins, Ex parte, 277 U. S. 565	10
Commission v. *Brashear Lines*, 312 U. S. 625	10
Country Garden Market, Inc. v. *Bowles*, 141 F. 2d 540, certiorari denied, 322 U. S. 752	9
Director of Prisons v. *Court of First Instance of the Province of Cavite*, 239 U. S. 633, explained in *United States v. Hamburg-American Co.*, 239 U. S. 466	5
Fleming v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111	6
Gallagher's Steak House v. *Bowles*, 142 F. 2d 530, certiorari denied, 322 U. S. 764	9
Gally v. *Interstate Nat. Gas Co.*, 292 U. S. 16	10
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146	6, 7
Jameson & Co. v. *Morgenthau*, 307 U. S. 171	10
Jones v. *Montague*, 194 U. S. 147	5
List v. *Pennsylvania*, 131 U. S. 396	5
Menken v. *Atlanta*, 131 U. S. 405	5
Mills v. *Green*, 159 U. S. 651	4, 5
Oklahoma Gas Co. v. *Packing Co.*, 292 U. S. 386	10
O'Neal v. *United States*, 140 F. 2d 908, certiorari denied, 322 U. S. 729	9
Osage Tribe of Indians v. *Ickes*, 45 F. Supp. 179	11
Pendergast v. *United States*, 314 U. S. 574	10
Phillips v. *United States*, 312 U. S. 246	10
Public Bank, Ex parte, 278 U. S. 101	11
Pub. Serv. Comm'n. v. *Brashear Lines*, 306 U. S. 204	10
Richardson v. *McChesney*, 218 U. S. 487	5
Rorick v. *Comm'rs.*, 307 U. S. 208	10
Ruppert v. *Caffey*, 251 U. S. 264	6

Cases—Continued Page

Smith v. *United States*, 94 U. S. 97 5
Smith v. *Wilson*, 273 U. S. 388 10
St. Pierre v. *United States*, 319 U. S. 41 5
Stewart v. *Kahn*, 11 Wall. 493 6
Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10 ..... 10, 11
United States v. *Petrillo*, 332 U. S. 1 7
United States v. *Phillips*, 6 Pet. 776 5
United States v. *Randall*, 140 F. 2d 70 9
United States v. *Tire Center, Inc.*, 50 F. Supp. 404 9
United States v. *Wittmeyer*, 89 F. 2d 660 5
Walter Brown & Sons v. *Bowles*, 58 F. Supp. 323 9
Water Service Co. v. *Redding*, 304 U. S. 252 10
Williams, Ex parte, 277 U. S. 267 11
Woods v. *The Cloyd W. Miller Co.*, No. 486 this Term, decide February 16, 1948 6
Yakus v. *United States*, 321 U. S. 414 ..... 8, 9

Statutes:

Act of August 24, 1937 (c. 754, sec. 3, 50 Stat. 751, 752, 28 U.S.C. 380a) 2, 9
Judicial Code, § 266 (28 U.S.C. § 380) 10

Public Law 395, 80th Cong., 1st sess., approved December 30, 1947:

Sec. 1 8
Secs. 2, 3, 4(a), 6, 7, 8 7
Sec. 4(b) 1, 5, 6, 7, 8, 9

Second War Powers Act, 1942, Title III (50 U.S.C. App., Sec. 633) 2

Miscellaneous:

93 Cong. Rec. 11624 (unbound) 7
93 Cong. Rec. 11851, 11855, 11856, 11859 (unbound) 6
Executive Order 9915, Dec. 30, 1947 (12 F. R. 8875) 2

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 719

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, APPELLANTS

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

These motions are filed by the appellee pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement as to Jurisdiction and other papers filed by the appellant, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellants in the District Court of the United States for the District of Columbia to enjoin appellee from enforcing Section 4(b) of Public Law 395, 80th Cong., 1st sess., or any order issued thereunder. A specially constituted three-judge court was convened

pursuant to the Act of August 24, 1937 (c. 754, sec. 3, 50 Stat. 751, 752, 28 U.S.C. 380a). On January 27, 1948, the three-judge court ordered that the cause be remitted to a single district court judge for appropriate action on the ground that no substantial constitutional question was presented. Appellants' petition for appeal was allowed by the district court on February 26, 1948.

STATEMENT

Public Law 395 was approved December 30, 1947. Section 4(b) of Public Law 395 provides as follows:

> Notwithstanding any other provision of law, Title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such Title III with respect to the use of grain for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948.

Title III of the Second War Powers Act, 1942 (50 U.S.C. App. Sec. 633), provides, in pertinent part, as follows:

> Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

The authority granted to the President by Section 4(b) of Public Law 395 was delegated to the Secretary of Agriculture, appellee, by Executive Order 9915, dated December 30, 1947 (12 F. R. 8875). On the same day appellee allocated the gross amount of approximately 2,500,000 bushels

of grain for use in the production of distilled spirits or neutral spirits for beverage purposes during the period December 31, 1947, through January 31, 1948. Appellee's order provided for the allocation of grain among the distillers in accordance with a formula giving consideration to usage from December 1, 1946, to March 31, 1947, as a base period and to plant capacity.

On January 8, 1948, appellants, who are engaged in the production and sale of distilled spirits for beverage purposes, filed two complaints and, on the following day, two motions for preliminary injunctions. One complaint alleged the unconstitutionality of the statute and the order issued under it. The other alleged the invalidity of the order. After a three-judge court had been convened in the statutory case, both cases were ordered consolidated upon appellee's motion because of the related constitutional issue. After a hearing before the three-judge court on the applications for preliminary injunctions, an order was entered in the consolidated action on January 27, 1948, which recited the court's unanimous opinion that Section 4(b) of Public Law 395 was constitutional and the holding of a majority of the court that there was no substantial question of constitutionality. The court therefore remitted the case to a single judge for appropriate action. On January 30, 1948, in an opinion which stated "the complaints are dismissed," the single district court judge upheld the validity of the Secretary of Agriculture's order of allocation. On February 17, 1948, an order was entered by the single district judge denying the application for an injunction and dismissing the complaint in the suit which attacked the validity of the order. No further order has been entered in connection with the application to restrain enforcement of the statute.

DISCUSSION

For reasons discussed hereafter, it is doubtful that the order of the three-judge court remitting the case to a single judge for appropriate action is directly reviewable by appeal to this Court. In any event, however, there is no occasion to review the decision below because the case is moot by virtue of the expiration of the statutory provision under attack. Moreover, the determination of the court below that Section 4(b) was constitutional is clearly correct. For the foregoing reasons, it is submitted that the decision below should be affirmed or the appeal dismissed.

1. The expiration of the authority granted by Section 4(b) on January 31, 1948, removes any possible basis for appellants' suit for an injunction to restrain enforcement of its provisions or orders issued under its terms. A determination of the constitutionality of Section 4(b) could have no effect except as an advisory opinion in the event that similar legislation is enacted by Congress in the future, or that a penalty is sought to be imposed for some past violation. There is no subject matter in issue between the parties upon which a judgment could operate. It does not appear that appellants have not complied with appellee's order or that any actions to impose penalties are threatened or imminent, nor does it appear that the Secretary of Agriculture has any present authority to impose penalties for violations that may have occurred. In these circumstances, it is submitted, the case is moot. "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U. S. 378, 390; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217. As was held in *Mills* v. *Green*, 159 U. S. 651, 653:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judg-

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> ment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Any damage appellants may have suffered through compliance with appellee's order is beyond the power of this Court to remedy. The case has thus become moot under the general rule that the Court will not pass upon a question when it is powerless to undo what has been done. *St. Pierre* v. *United States,* 319 U. S. 41; *Chandler* v. *Wise,* 307 U. S. 474, 477-478; *Brownlow* v. *Schwartz,* 261 U. S. 216, 217-218; *Director of Prisons* v. *Court of First Instance of the Province of Cavite,* 239 U. S. 633, explained in *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 476; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Jones* v. *Montague,* 194 U. S. 147; *Ex parte Baez,* 177 U. S. 378, 389-390; *Mills* v. *Green,* 159 U. S. 651, 653; *Menken* v. *Atlanta,* 131 U. S. 405, *List* v. *Pennsylvania,* 131 U. S. 396; *Cheong Ah Moy* v. *United States,* 113 U. S. 216, 218; *Smith* v. *United States,* 94 U. S. 97; *United States* v. *Phillips,* 6 Pet. 776; *United States* v. *Wittmeyer,* 89 F. 2d 660 (C. C. A. 9).

2. The order of the court below upholding the constitutionality of Section 4(b) of Public Law 395 is clearly correct.

a. Despite the express provision of Section 4(b) that "title III of the Second War Powers Act, 1942, is hereby revived and reenacted" in designated respects, appellants contend that it does not purport to be an exercise of the

war power. Its unconstitutionality is therefore asserted on the ground that it is not an exercise of any power granted to Congress. It is further contended that even if an exercise of the war power, Section 4(b) is unconstitutional because it is not reasonably adapted to an effective exercise of that power. Although the revival and reenactment of a portion of "the Second War Powers Act" would seem to be a sufficiently specific expression of an intention to act under the war power, it is clear that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *The Cloyd W. Miller Company,* No. 486, this Term, decided February 16, 1948. Furthermore, the declaration of the purpose, among others in Section 1 "to aid in stabilizing the economy of the United States" and "to aid in curbing inflationary tendencies," as well as the various other provisions of the statute, demonstrates an unmistakable intention to deal with problems arising directly from the recent hostilities. The food shortages in war-ravaged countries and the impact of these shortages on our domestic economy were discussed at length in the congressional debates relating to Section 4(b). See, *e.g.*, 93 Cong. Rec. 11851, 11855, 11856, 11859 (unbound). The power of Congress in the exercise of the war power to reach problems growing out of the war while a state of war still exists cannot seriously be questioned. *Woods* v. *The Cloyd W. Miller Company, supra; Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U. S. 111; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ruppert* v. *Caffey,* 251 U. S. 264; *Stewart* v. *Kahn,* 11 Wall. 493.

b. Appellants' further argument that Section 4(b) is unconstitutional because it bears no reasonable relation to the solution of problems created by the war amounts to an assertion that diversion of grain from non-food purposes

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has no relation to meeting the problem of world food shortages. This contention is directly refuted by the recent statement of this Court in *Woods* v. *The Cloyd W. Miller Company, supra,* that "prohibition laws which were enacted after the Armistice in World War I were sustained as exercises of the war power because they conserved manpower and increased efficiency of production in the critical days during the period of demobilization, and *helped to husband the supply of grains and cereals depleted by the war effort.*" (Emphasis supplied). Appellants' objection is in effect an attack upon the wisdom of Congress' decision to accomplish its purpose by imposing mandatory controls on a single industry. But this Court has recently announced that it would not strike down legislation "even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area." *United States* v. *Petrillo,* 332 U. S. 1, 9. See also, *e.g., Hamilton* v. *Kentucky Distilleries & W. Co.,* 251 U. S. 146, 161. Appellants' argument that regulation of the distilling industry alone cannot effectively conserve grain also overlooks the fact that Section 4(b) is but a single subsection of a statute which provides various methods for dealing with food and other shortages. See Sections 2, 3, 4(a), 6, 7 and 8. Although the statute primarily contemplates voluntary controls (Section 2), mandatory controls were authorized for the distilling industry only because voluntary controls had broken down. See 93 Cong. Rec. 11624 (unbound).

c. The constitutional attack upon Section 4(b) as an invalid delegation of legislative authority is also untenable. The specific definition of the commodity to be allocated, the limitation of the power to a single industry, and the short period of regulation (until January 31, 1948), would seem, in and of themselves, sufficiently to circumscribe the per-

missible area of administrative action to refute any charge of unconstitutional delegation. See *Yakus* v. *United States*, 321 U. S. 414, 424. Taken together with the statement of purposes contained in Section 1 of Public Law 395, the standards prescribed in Title III of the Second War Powers Act, 1942, and the legislative and administrative background of the enactment, the authority granted, narrowly restricted as it is in both time and scope, would seem unassailable as a valid delegation.

Title III of the Second War Powers Act, 1942 (50 U. S. C., App. Sec. 633), which has been "revived and reenacted" by Section 4(b) of Public Law 395 with respect to the exercise of powers relating to designated uses of grain, prescribes the occasion for and the standards to be employed in the exercise of the power.[1] Public Law 395, entitled a "Joint Resolution To aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes," contains the following statement of purposes in Section 1:

> The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and facilities, and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production.

It is submitted that the foregoing statutory provisions contain adequate standards of administrative action. The allocation of materials may be made only when "the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage" and only "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public

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[1] The pertinent section is set forth in the statement *supra*.

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interest and to promote the national defense." This administrative authority is further conditioned by the statement of purposes in Public Law 395. See *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104.

The validity of the standards of Title III of the Second War Powers Act has been challenged in the Federal Courts on numerous occasions and has been uniformly sustained. *O'Neal* v. *United States*, 140 F. 2d 908 (C. C. A. 6), certiorari denied, 322 U. S. 729; *United States* v. *Randall*, 140 F. 2d 70 (C. C. A. 2); *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Country Garden Market, Inc.* v. *Bowles*, 141 F. 2d 540 (App. D. C.), certiorari denied, 322 U. S. 752; *Walter Brown & Sons* v. *Bowles*, 58 F. Supp. 323 (D. C. D. C.); *United States* v. *Tire Center, Inc.*, 50 F. Supp. 404 (D. Del.). The correctness of these decisions is established by the numerous decisions of this Court which have approved delegations no less general or indefinite. The standards upheld are discussed in *Yakus* v. *United States*, 321 U. S. 414, 426-427 and *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104-105. It is clear from this discussion that the standards imported into Section 4(b) by the limited reenactment of Title III of the Second War Powers Act, conditioned by the statement of purposes in Public Law 395, satisfy constitutional requirements.

3. This does not appear to be a case for review by direct appeal to this Court. Because of its holding that there was no substantial question of the constitutionality of Section 4(b), the only order entered by the three-judge court was one remitting the cause to a single district court judge for appropriate action. No order granting or denying an interlocutory or permanent injunction, the jurisdictional prerequisite to direct appeal (Act of August 24, 1937, c. 754, Sec. 3, 50 Stat. 751, 752, 28 U. S. C. § 380a), was entered.

The existence of a substantial constitutional question is a condition to the exercise of jurisdiction by a three-judge court and to the right of direct appeal to this Court. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Water Service Co.* v. *Redding*, 304 U. S. 252; *Ex parte Buder*, 271 U. S. 461; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 15.[2] The heavy burden which the assembly of three-judge courts and direct appeals impose on the federal courts has resulted in a strict interpretation of cases which require three judges (*Ex parte Collins*, 277 U. S. 565, 569; *Water Service Co.* v. *Redding, supra*, at 255; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391; *Phillips* v. *United States*, 312 U. S. 246, 250-251; *Smith* v. *Wilson*, 273 U. S. 388; *Rorick* v. *Comm'rs*, 307 U. S. 208; *Gally* v. *Interstate Nat. Gas Co.*, 292 U. S. 16; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Public Bank*, 278 U. S. 101) and a literal construction of decrees "granting or denying • • • an interlocutory or permanent injunction" from which appeals may be taken. *Pendergast* v. *United States*, 314 U. S. 574; *American Insurance Co.* v. *Lucas*, 314 U. S. 575. Cf. *Pub. Serv. Comm'n* v. *Brashear Lines*, 306 U. S. 204; *Commission* v. *Brashear Lines*, 312 U. S. 625. Upon deciding that no substantial constitutional question was presented, the three-judge court had no jurisdiction to pass upon the other issues in the case and properly remitted the cause for appropriate action to a single district judge. *Jameson & Co.* v. *Morgenthau, supra; Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391-392. The order of a three-judge court declining jurisdiction is not one granting or denying an injunction and consequently is not directly reviewable by appeal. *Pub. Service Comm'n* v. *Brashear Lines, supra;* cf. *Pendergast* v. *United States,*

[2] The applicability of decisions relating to three-judge courts under § 266 of the Judicial Code (28 U.S.C. § 380) has been recognized. *Water Service Co.* v. *Redding, supra*, at 254. Decisions under § 266 will therefore be cited as authority without special comment.

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supra; American Insurance Co. v. *Lucas, supra.* The refusal of a single judge to convoke a three-judge court has consistently been held subject to review by mandamus. *Ex parte Williams,* 277 U. S. 267; *Ex parte Bransford,* 310 U. S. 354; *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10. Mandamus would also seem to be the proper remedy for a three-judge court's improper refusal to act. *Ex parte Public Bank,* 278 U. S. 101; *Osage Tribe of Indians* v. *Ickes,* 45 F. Supp. 179, 186-187 (D. C. D. C.). Mandamus will present only the question of jurisdiction and will not raise other questions presented by the appeal which the three-judge court did not consider.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, in the alternative, that the judgment below be affirmed pursuant to paragraph 3 of Rule 12 and paragraphs 3 and 4 of Rule 7 of this Court.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948

U. S. GOVERNMENT PRINTING OFFICE, 1948